IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Supreme Court, U. S.
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No. 79-365

CITIZENS UTILITIES COMPANY AND CITIZENS UTILITIES COMPANY OF CALIFORNIA,

Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY; BELL TELEPHONE COMPANY OF NEVADA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Citizens Utilities Company and Citizens Utilities Company of California ("Citizens") respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 30, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, reported at 595 F.2d 1171, appears in Appendix A hereto. The unreported Memorandum and Order of the district court denying reconsideration appears in Appendix B hereto. The relevant portion of the reporter's transcript of the proceedings of the district court on December 17, 1976 appears in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 30, 1979. Appellants' timely petition for rehearing was denied by the court of appeals on June 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rules of Civil Procedure, Rule 41(b):

> *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.
>
> * * * *
>
> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits.

QUESTIONS PRESENTED

I. Whether Rule 41(b) of the Federal Rules of Civil Procedure permits a federal district court to dismiss

a case for lack of prosecution *when it is ready for trial* solely on the ground that it has not been brought to trial for sixteen years

> (i) without a finding of "deliberate delay" on the part of plaintiffs;
>
> (ii) where a significant portion of the delay is admittedly caused (as found by the courts below) by defendants;
>
> (iii) where the final period of delay of twenty-seven months was caused by a failure of the judicial assignment procedures of the court below; and
>
> (iv) without consideration of lesser sanctions.

II. Whether the decision below is in conflict with decisions of the Fifth Circuit and of other circuits, which have specifically required findings in accordance with the above mentioned criteria.

STATEMENT OF THE CASE

Citizens brought this antitrust action on October 21, 1960, asserting that the American Telephone and Telegraph Company had combined and conspired with the Pacific Telephone and Telegraph Company, Bell Telephone Company of Nevada, and other operating companies of the Bell System (defendants are sometimes collectively referred to as "Bells") in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Citizens claimed that Bells had engaged in price fixing and had unlawfully colluded to secure an inequitable division of revenues for interchanged telephone calls.

The sixteen year record of this case is a testament to Bells' imaginative use of a strategy of delay to frustrate Citizens' right to obtain a trial on the merits

of these claims. The relevant facts are not in dispute. Overall, they demonstrate that there is not a scintilla of evidence in this record that Citizens deliberately delayed these proceedings.

On March 12, 1964, three years after the filing of the complaint, Citizens expressed concern with the pace of the litigation by moving the court for a preliminary pretrial conference to plan a program for discovery and to discuss a trial date. Record at 33-35.

On June 6, 1966, Citizens repeated this motion, urging the court (1) to assign the case to a single district judge; (2) to establish a schedule for the completion of discovery; (3) to establish a briefing schedule; and (4) to fix a tentative trial date.[1] Record at 66-67.

Bells opposed both of these attempts by Citizens to expedite the progress of the case to trial arguing that an accelerated pace would prejudice their defense because they were only beginning their discovery. Bells contended that, "in determining the reasonableness of the length of time it is taking this case to get to trial, this court should have in mind the complexity of the litigation." Record at 78.[2]

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[1] Citizens' accompanying memorandum of points and authorities reminded the court that this was a "protracted case," that it had "been on file for over five years," that in its then posture, Citizens had "substantially completed their discovery" whereas Bells had barely begun theirs, and asked the court to "take a firm hand in compelling defendants to complete their preparation for the trial of the case." Record at 68-69. The court did not heed Citizens' request.

[2] Bells further stated that, "notwithstanding the complexity of the subject matter, discovery . . . has proceeded as expeditiously as possible, and in a manner not at odds with the interests of this court in the orderly progress of litigation or the management of its calendar." Record at 79.

Even though the case was already six years old, the court allowed Bells additional time for discovery and refused to set a schedule for the future management of the case.

On August 12, 1970, Citizens filed another motion for a pretrial conference, calling the court's attention to the fact that the case was ten years old, that the parties had already completed extensive discovery, and that "[t]he case needs judicial supervision." Citizens strongly urged the court to set a deadline to terminate discovery and to fix "[a]t least a tentative trial date." Record at 154. Citizens withdrew this motion only when Bells stipulated on September 10, 1970 that the parties would arrange an early date for a pretrial conference and would establish a schedule for the completion of discovery. Record at 157-58.[3]

On July 6, 1971, Citizens for the fourth time moved for a pretrial conference to establish (1) a final discovery schedule, (2) a date for the final pretrial conference, and (3) a trial date. Citizens again argued that the case had "reached a stage requiring judicial supervision to expedite the remaining discovery and establish a trial date."[4] Record at 166-67.

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[3] Six months later, on March 10, 1971, the parties stipulated that Bells would advise Citizens by May 7, 1971 of their intention to file any pretrial motions for dismissal or summary judgment. Otherwise, the parties agreed jointly to ask the court to schedule the completion of discovery and to set a tentative trial date. The stipulation established a schedule for the briefing and filing of such motions, should Bells wish to make them, during the summer of 1971. Record at 159-60.

[4] Citizens' supporting memorandum urged that the court take advantage of the pretrial procedure available to it under Rule 16 of the Federal Rules of Civil Procedure and directed the court's attention to *Viking Theatre Corp.* v. *Paramount Film Distrib-*

Bells for a fourth time successfully resisted Citizens' efforts to establish a trial date. Record at 170.

Thereafter, on September 16, 1971, Bells filed a motion for summary judgment on the ground that Bells enjoyed implied immunity from the antitrust laws because primary or exclusive jurisdiction lay in the Federal Communications Commission or the California Public Utilities Commission. The court denied this motion on May 25, 1972. Record at 252. Bells then requested, over Citizens' objections, that the trial *not* be scheduled during 1972, and the court set the trial for March 5, 1973.[5]

Incredibly, this schedule, agreed to by Bells, was again disrupted when Bells moved for summary judg-

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uting Corp., 320 F.2d 285 (3d Cir. 1963), which stated:

> "The protracted case contributes to the congested calendar and consequently presents a major problem in those districts in which there is a concentration of this type of litigation. The solution to the problem lies in the effective . . . use of the pretrial procedures contemplated by Rule 16 of the Federal Rules of Civil Procedure, 28 U.S.C.A. The failure to use these procedures in the protracted case can only result in a waste of judicial manpower, a waste which the administration of judicial business can ill afford."

Id. at 301.

[5] In their pretrial statement of July 14, 1972, Bells requested that the trial date be set "not earlier than the first part of next year" on the grounds that Bells' counsel would be engaged in trial in another case from August 15, 1972 until approximately October 1, 1972, and "in view of subsequent calendar commitments and the necessity of preparing for this complicated trial." Record at 260. In addition, Bells estimated that their defense at trial "could not reasonably be expected to be completed in less than a month and a half." *Id.* In sharp contrast, Citizens' pretrial statement stated that Bells' estimate of time required for trial was excessive and that Citizens could complete presentation of their evidence within two weeks. Citizens requested a trial date "no later than December 1972." Record at 267.

ment, on precisely the same ground which the court had rejected only six months earlier,[6] at a pretrial conference just two weeks before the trial was to begin. This motion was denied in a two-page order entered on April 5, 1973. Bells sought extraordinary appellate relief pursuant to 28 U.S.C. § 1292, thus forcing the district court, by order of April 6, 1973, to take the case off the calendar.[7] Record at 310.

This Court denied Bells' petition for a writ of certiorari, and the parties stipulated that trial could begin on March 18, 1974. Record at 311.

One further disruption intervened. Approximately two weeks before the trial was to begin, Judge Harris, after extensive involvement with the case, informed the attorneys that he could not proceed with trial on March 18, or in the foreseeable future, because of another protracted trial and his ever-increasing calendar backlog.[8] He presented two alternatives: (1) the

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[6] In their February 20, 1973, pretrial statement, Bells also requested the court to continue the case contending that a proceeding before the Federal Trade Commission in which Bells' counsel were engaged had dragged on longer than expected. Record at 298.

[7] The Court of Appeals for the Ninth Circuit denied Bells' petition for a writ of mandamus on July 10, 1973, and on December 3, 1973, this Court denied Bells' petition for a writ of certiorari. 414 U.S. 1080 (1973).

[8] The record does not precisely establish the date on which Judge Harris informed the parties of his inability to proceed with the trial, but it is clear that this took place approximately a week prior to March 7, when Bells wrote Judge Harris referring to "the conference in your chambers last week" at which "you advised counsel of the calendaring problems . . . which will make it impossible for you to proceed with the trial of the *Citizens* case on March 18, 1974, as previously scheduled . . . ." Record at 341-42.

case could be assigned, by consent of all parties, to a magistrate for trial, or (2) the case could be reassigned to another judge for trial noting that this alternative would result in further delay. On March 7, 1974, Bells advised the court that they would not consent to a trial before a magistrate. Record at 341-42. Bells' refusal to accept trial before a magistrate caused the case to be removed from the trial calendar.

Shortly thereafter, Judge Harris requested that a substitute judge be assigned to the case, and on April 25, 1974, Chief Judge Chambers wrote to Judge Harris stating that he was looking for a judge to try the case on the merits.

For the ensuing twenty-seven months, the court failed to make an assignment. It was not until June 29, 1976, after Citizens had again requested "that the case should again be set for trial with appropriate deliberate expedition," that Chief Judge Chambers finally assigned Judge Ferguson to the case. Record at 568, Exhibit G.[9] The record does not disclose the

[9] In the twenty-seven month interval, while the parties awaited a new judicial assignment, a side issue arose concerning plaintiff's counsel which Citizens believes to be entirely irrelevant to the decisions below. The matter is discussed extensively at pages 16 and 17 below. In summary, Citizens' counsel advised Judge Harris by letter dated March 12, 1974, about twelve days *after* Judge Harris had decided not to proceed with the trial, that they, Joseph Alioto's law firm, no longer had authority to proceed on behalf of Citizens without the prior approval of Citizens' chief executive officer. The same letter informed Judge Harris that Mr. Alioto's firm had not been discharged and that the case was then ready for trial before either a judge or a magistrate. In June of 1974, Mr. Alioto formally withdrew from the case and Citizens engaged in a broad and difficult search for replacement counsel to try this complex case, burdened by the breach with Mr. Alioto, who had become a candidate for Governor of California. Citizens did secure new counsel who were prepared to proceed to trial at the time of Judge Ferguson's assignment.

reason for this breakdown in judicial assignment procedures.

Bells' response to what finally looked like an inevitable trial setting was to file a motion to dismiss for lack of prosecution. This was the first time Bells had expressed any concern with the rate of progress of the case. While this motion was pending, both sides filed trial briefs of law and fact. The case was thus once again ready for trial.

Following a hearing on December 17, 1976, Judge Ferguson, as his first action in the case, granted Bells' motion to dismiss for failure to prosecute and held in the alternative, in contradiction to Judge Harris' two earlier rulings, that jurisdiction lay in the regulatory agencies.

On April 30, 1979, the court of appeals, by a divided vote, affirmed the district court's dismissal for lack of prosecution, despite its recognition "that foot-dragging by Bell may have contributed to the numerous delays." P. A-8, *infra;* 595 F.2d at 1174.[10]

Judge Carter dissented in strong language calling the majority's decision a "miscarriage of justice." Given Bells' "major contributions" to the delay, he concluded that

> "[T]o reward defendants for their delaying conduct seems to me unthinkable. It was a breach of discretion to dismiss. I would reverse and let the case be tried."

P. A-12, *infra;* 595 F.2d at 1176 (footnote omitted).

[10] In view of its affirmance of the Rule 41(b) dismissal, the Ninth Circuit found it unnecessary to reach the issue of whether the district court properly invoked the doctrine of primary jurisdiction. P. A-9 n.8, *infra;* 595 F.2d at 1174 n.8.

REASONS FOR GRANTING THE WRIT

(1) This case presents important issues relating to Rule 41(b) which have been left undecided by this Court, and which have resulted in considerable confusion in the lower federal courts.

(a) Standards for dismissal for failure to prosecute have not been considered by this Court since the *Link* decision of 1962.

This Court last addressed the discretion of lower federal courts under Rule 41(b) to dismiss for lack of prosecution in *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962). In a 4-3 decision, over a strong dissent by Mr. Justice Black, the Court affirmed a dismissal for lack of prosecution, carefully basing its holding on these four specific circumstances:

> (1) the courts below were warranted in concluding that plaintiff "had been *deliberately* proceeding in *dilatory* fashion," 370 U.S. at 633 (emphasis added);
>
> (2) "there [was] no showing whatever that plaintiff ever made any effort to bring the case to trial," 370 U.S. at 634 n.11;
>
> (3) "[t]he history of the case belie[d] any suggestion that the delay was the fault of the defendant," *Id.*; or
>
> (4) "the fault of the . . . district judge . . . ." *Id.*

Having so confined its decision, the majority found it unnecessary to develop a comprehensive standard for evaluating a Rule 41(b) motion. Nonetheless, this Court made it clear that there must be a careful evaluation of the respective roles of the plaintiff, the defendant, and the court in delaying the prosecution of a case before granting dismissal.

The law applied in this case is quite to the contrary. Two of the three appellate judges below decided that delay alone, for "whatever reason", was sufficient ground for the trial court's dismissal. More specifically:

> (1) the courts below did not find or suggest that Citizens deliberately caused delay, nor is there any evidence in the record to that effect;
>
> (2) the uncontroverted record shows that Citizens made numerous determined efforts to "bring the case to trial";
>
> (3) the uncontroverted history of the case shows that Bells was at "fault" in repeatedly delaying all of Citizens' efforts to proceed to trial; and
>
> (4) the judicial reassignment procedures of the courts below were responsible for the final twenty-seven months of delay.

(b) Considerable confusion has arisen in the lower courts since the *Link* decision.

A review of the major treatises (*see, e.g.*, Wright & Miller, Federal Practice and Procedure: Civil §§ 2369-70 (1971); 5 Moore's Federal Practice ¶ 41.11 (1979)), demonstrates that in the seventeen years since the *Link* decision, there have been more than 100 decisions in the courts of appeals involving dismissals under Rule 41(b). In approximately fifty-four percent of these cases, dismissals under Rule 41(b)

were affirmed; in approximately forty-six percent, such dismissals were reversed in whole or in part.

A close examination of these reported cases discloses that the Fifth and Ninth Circuits account for almost half of all decisions involving Rule 41(b) dismissals. In the Fifth Circuit, approximately sixty-one percent of the district courts' dismissals have been reversed, and thirty-nine percent have been affirmed. In sharp contrast, approximately ninety percent have been affirmed in the Ninth Circuit, and only ten percent have been reversed.

The present case well illustrates the need for a more comprehensive standard. The district court dismissed Citizens' action, despite the fact that the parties were before the court and ready for trial,[11] basing its decision on the naked ground that procrastination "for whatever reason" (and in spite of defendants' admitted culpability) could be the basis for dismissal with prejudice. A panel of the court of appeals, with Judge Carter dissenting, affirmed relying primarily on the fact that the case had been pending for sixteen years.

Neither the district court nor the court of appeals thought it necessary to evaluate the reasons for delay and neither seemed to be concerned with dismissing a case that was ready for trial. The fact that the courts below ignored the criteria for dismissal which other courts have relied upon highlights the inconsistency of the lower federal courts in implementing Rule 41(b).

[11] Indeed, as noted in the Statement of the Case, the parties were entirely ready for trial on two prior occasions.

As a result, cases have regularly been dismissed in some circuits for conduct which would not permit dismissal in others.

(2) The decisions below are in substantial conflict with standards applied by other federal courts.

(a) "Deliberate delay" by plaintiffs.

(i) The Fifth Circuit, among others, requires a showing of "deliberate delay" by plaintiffs.

In *Durham* v. *Florida East Coast Ry.*, 385 F.2d 366 (5th Cir. 1967), Judge Wisdom cited *Link* in reversing a district court's dismissal under Rule 41(b), stating that the sanction of dismissal, although "discretionary," is the most severe sanction that a court may apply and, consequently, is appropriate "only in the face of *a clear record of delay and contumacious conduct by the plaintiff.*" *Id.* at 368 (emphasis added). The Fifth Circuit thus requires a demonstration that the plaintiff intentionally delayed the progress of the case or, like the attorney in *Link* v. *Wabash R.R., supra*, 370 U.S. at 633, "deliberately proceed[ed] in dilatory fashion."

The Fifth Circuit adhered to this rule even more explicitly in *Flaksa* v. *Little River Marine Construction Co., Inc.*, 389 F.2d 885 (5th Cir. 1968), *cert. denied*, 392 U.S. 928 (1968), where it stated that it had "adopted the view that [dismissal for lack of prosecution] is too harsh except in extreme circumstances" and "has generally followed the more modern tenor appearing in [Judge Wisdom's statement in *Durham*] . . . ." *Id.* at 888. *Accord, Connolly* v. *Papachristid Shipping, Ltd.*, 504 F.2d 917 (5th Cir. 1974).

The Fourth Circuit has followed the lead of the Fifth Circuit in limiting dismissals to instances of deliberate delay by plaintiff. *See, e.g., Reizakis* v. *Loy,* 490 F.2d 1132 (4th Cir. 1974) (adopting Judge Wisdom's language from *Durham*).

Similarly, the Second Circuit has held that "general principles cannot justify denial of a party's fair day in court *except upon a serious showing of willful default.*" *Gill* v. *Stolow,* 240 F.2d 669, 670 (2d Cir. 1957) (per Clark, J.) (emphasis added).[12]

(ii) Citizens was not found and could not be found to have deliberately delayed these proceedings.

The decisions below are in direct conflict with the "clear record of delay and contumacious conduct" required by the Fifth and other Circuits.

In the first eleven years of this case, Bells aggressively opposed each of the four motions made by Citizens to expedite these proceedings. And, when Citizens filed a motion to schedule the trial on July 6, 1971, Bells filed repetitious motions for summary judgment and pursued a series of extraordinary ap-

[12] *Compare, e.g., Glo Co.* v. *Murchison and Co.,* 397 F.2d 928, 929 (3d Cir. 1967), *cert. denied,* 393 U.S. 939 (1968) (dismissal inappropriate despite plaintiff's failure to move for trial after repeated warnings by the court) *with Anderson* v. *Air West, Inc.,* 542 F.2d 522, 524 (9th Cir. 1976) (dismissal appropriate where plaintiff failed to prosecute with "reasonable diligence"); *Dyotherm Corp. v. Turbo Machine Co.,* 392 F.2d 146 (3d Cir. 1968) (counsel's tardiness and lack of preparedness "inexcusable," but not sufficient for dismissal with prejudice) *with Schwarz* v. *United States,* 384 F.2d 833 (2d Cir. 1967) (dismissal justified by plaintiff's "inexcusable neglect" ir failing to advise court of inability to proceed with trial until day before trial was to begin).

peals which delayed the trial setting to March 18, 1974, a delay of almost three years.

Thus, for almost fourteen years, Bells successfully frustrated Citizens' efforts to bring this case to trial.

The critical factor is that this case was actually ready for trial on two separate trial dates (March 5, 1972 and March 18, 1973) that were agreed to by the parties and by the court. Both dates were vacated against the wishes of plaintiff: once by Bells' act, and once by an act of the court.

The uniform view of commentators is that prior delay by plaintiff, even of a grievous nature, cannot be the basis for dismissal where the parties subsequently breathe "new life into [a] dormant case." by their voluntary action, such as a stipulation for trial.[13]

Nor is there any basis in the record for blaming Citizens for the ensuing delay of twenty-seven months.

On about March 1, 1973[14] Judge Harris took himself out of the case because of his trial schedule and informed the parties they could either proceed to trial before a magistrate or await reassignment to another judge.

[13] *Raab* v. *Taber Instrument Corp.,* 546 F.2d 522, 524 (2d Cir. 1976), *cert. denied* 431 U.S. 915 (1977). Professors Wright and Miller subscribe to this view in their treatise on Federal Practice and Procedure:

> "[i]f the claim is presently being prosecuted with diligence it cannot be dismissed because at some earlier time plaintiff did not act diligently." 9 Federal Practice and Procedure: Civil § 2370 at 204 (and cases cited).

[14] *See* note 8 at page 7, *supra.*

Bells immediately rejected trial before a magistrate, and on April 25, 1974 Judge Harris asked Chief Judge Chambers "to find a trial judge . . . *to try* the . . . case."[15] (Emphasis added.)

About twelve days after learning of the unilateral withdrawal of Judge Harris, Citizens' law firm (that of Joseph Alioto), advised the court that they no longer had the authority to act on behalf of Citizens without the prior approval of Citizens' chief executive officer, but that Citizens' case was ready for trial before a judge or a magistrate. Joseph Alioto withdrew as Citizens' counsel on June10, 1974. Record at 393.

Bells have repeatedly argued that Citizens' dispute with Mr. Alioto caused the final twenty-seven month delay in these proceedings:

> "[T]he plaintiffs, in firing Mr. Alioto . . . just one week before the trial was to begin . . . stopped the action."[16]

This argument provoked Judge Carter to observe that Bells' counsel "deliberately misled Judge Ferguson."[17]

Bells' argument is simply incorrect. Citizens did have a dispute with Mr. Alioto,[18] and Citizens did

[15] Record at 568, Exhibits B and C.

[16] Oral argument before Judge Ferguson, Reporter's Transcript of Proceedings of December 17, 1976, p. 14. *See also* Bells' Memorandum of Points and Authorities in Support of its Motion to Dismiss at p. 2.

[17] P. A-11 n.2, *infra*.

[18] In fact, in the course of his withdrawal Mr. Alioto refused to release Citizens' records in this case claiming a lien on them until the payment of attorneys' fees. Record at 347-48.

have some difficulty finding trial counsel able to pick up their fourteen-year old complex case.[19] However, Judge Chambers caused Citizens' dispute with Mr. Alioto to be severed, and appointed a new judge to hear the attorney-client dispute, telling Judge Harris that "it would take a little longer to find a trial judge" for the "long trial."[20]

The only fact relevant to this petition and to the decision below is that it took the Chief Judge quite a "little longer" to make the assignment for the "long trial," but there is no evidence and no finding below that Citizens' difficulty in finding new counsel contributed in any way to this unexplained delay.

[19] During this period Citizens consulted with and carefully evaluated possible replacement counsel on not fewer than sixty-two occasions. Brief for Appellants before the Court of Appeals for the Ninth Circuit at 1, 9-10. Meanwhile, they were forced to hire special counsel to defend against their former attorney's attempt to place a lien on their records. The case was assigned to Judge Battin for the fee dispute. In order to avoid unnecessary delay, special counsel asked the court to postpone the hearing for attorneys' fees until after the main action had been concluded. Record at 380-84, 388-91. Judge Battin's designation expired on July 31, 1974, and no judge was assigned to the trial of the case. In the words of Judge Carter:

> "The case was thus in limbo. It was *not* on *any* judge's pretrial or trial or dismissal list. . . ."

P. A-11, *infra;* 595 F.2d at 1175 (emphasis in original).

[20] Record at 568, Exhibit C.

(b) Material delay caused by defendants.

(i) Dismissal is improper where defendants contribute materially to delay.

Some lower courts consider it inappropriate to dismiss where the defendant has substantially contributed to the delay. *See, e.g., Foxboro Co.* v. *Fischer & Porter Co.*, 29 F.R.D. 522 (E.D. Pa. 1961).[21] Indeed, this Court in *Link, supra*, 370 U.S. at 634 n. 11, stressed the importance of considering the defendant's responsibility for delay.

Other courts, including the Ninth Circuit, have not considered the defendant's contribution to delay on the grounds that "[t]he duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination. . . ." *Hicks* v. *Bekins Moving & Storage Co.*, 115 F.2d 406, 409 (9th Cir. 1940). *See also Forest Nursery Co.* v. *Crete Carrier Corp.*, 319 F.Supp. 213 (E.D. Tenn. 1970) (plaintiff ordered to show cause why action should not be dismissed despite fact that defendant was six months late in responding to summons and complaint).

(ii) Bells admittedly caused delay in this case.

In the instant case, the district court ignored Bells' role in creating the delay, stating, "[p]laintiffs have an

[21] This rule may also be implicit in numerous decisions of other courts which have focused upon whether the defendant had ever complained of delay prior to filing its motion to dismiss. *See, e.g., McCargo* v. *Hedrick*, 545 F.2d 393 (4th Cir. 1976); *Finley* v. *Parvin/Dohrmann Co., Inc.*, 520 F.2d 386 (2d Cir. 1975).

obligation to press forward . . . *even if defendants in part slow their progress.*" P. B-2, *infra*. (emphasis added). The Ninth Circuit upheld the district court's dismissal focusing on its finding of "actual prejudice" to Bells from the age of the case, despite its express recognition that "*foot-dragging by Bell may have contributed to the numerous delays* . . . ." 595 F.2d at 1174 (emphasis added).

(c) Delay caused by judicial procedures.

(i) Dismissal is improper where judicial procedures contribute materially to delay.

Courts have been understandably reluctant to dismiss a claim for want of prosecution where the court itself was responsible for some portion of the delay. In *Bendix Aviation Corp.* v. *Glass*, 176 F.Supp. 374 (E.D. Pa. 1959), a claim "fell between the cracks" of the court's calendar and lay dormant for more than four and one half years. The district court held in *Bendix* that the claimant was not chargeable for the delay and was entitled to rely upon the normal "machinery of the court, which moves cases along for trial . . . ." *Id.* at 376. The court pointed out that the claimant's attorney had no reason to assume that this machinery was not working properly. Under these circumstances, the court concluded that it would be "unduly harsh" to dismiss for want of prosecution. *Id.* at 377. *See Finley* v. *Parvin/Dohrmann Co., Inc., supra*, 520 F.2d at 386, 390.

(ii) Court reassignment procedures delayed the trial below for over two years.

Here, putting aside the district court's unwillingness to respond to Citizens' repeated requests for judicial management during the first fourteen years of the case, the process of judicial assignment simply broke down when Judge Harris announced his inability to continue with the litigation. Judge Harris twice sought a replacement, but the assignment was not forthcoming for twenty-seven months.

(d) Failure first to apply lesser sanctions precludes dismissal.

Most circuits subscribe to the proposition that lesser sanctions than dismissal must be used "except in the most flagrant circumstances." *Connolly* v. *Papachristid Shipping Ltd., supra,* 504 F.2d at 920. *Accord, Flaksa* v. *Little River Marine Construction Co. Inc., supra,* 389 F.2d at 888; *Boazman* v. *Economics Laboratory, Inc.,* 537 F.2d 210 (5th Cir. 1976); *Canada* v. *Mathews,* 449 F.2d 253 (5th Cir. 1971). The Fifth Circuit in particular has closely scrutinized the record of Rule 41(b) dismissals to determine whether "lesser sanctions would not [have] serve[d] the best interest of justice," *Connolly* v. *Papachristid Shipping, Ltd., supra,* 504 F.2d at 920,[22] and other circuits have

[22] The Court of Appeals for the Fifth Circuit stated in *Flaksa, supra:*

> "We are fully aware of the impelling need for cooperation from parties and attorneys to keep litigation on congested dockets moving; *but except in extreme circumstances, the court should first resort to the wide range of lesser sanctions which it may impose upon the litigant or the derelict attorney, or both.* The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it."

Id. at 888 (footnote omitted) (emphasis added).

adopted this approach. *See, e.g., Bush* v. *United States Postal Service,* 496 F.2d 42, 45 (4th Cir. 1974) (facts presented "an instance for the imposition of lesser sanctions than the ultimate penalty of dismissal with prejudice"); *Dyotherm Corp.* v. *Turbo Machine Co., supra,* 392 F.2d at 149 (3d Cir. 1968) (circumstances did not warrant harsh sanction of dismissal); *Dabney* v. *Burrell,* 67 F.R.D. 132, 133 (D. Md. 1975) (dismissal reserved for "extreme situations" where there is "compelling evidence of willful default."). *But see, e.g., Reid* v. *Prentice-Hall, Inc.,* 261 F.2d 700 (6th Cir. 1958) (no clear "abuse of discretion" despite lack of attempted lesser sanctions); *Securities and Exchange Commission* v. *Power Resources Corp.* 495 F.2d 297 (10th Cir. 1974) (dismissal after three-year delay without consideration of lesser sanctions, deferring to trial court's determination of failure to prosecute with "reasonable diligence").[23]

[23] Sanctions other than dismissal available to courts confronted with lack of prosecution include warning, formal reprimand, placing the case at the bottom of the calendar list, fine, imposition of costs or attorney fees, temporary suspension of counsel from practice before the court, and dismissal of the suit unless new counsel is secured. *Santiago* v. *Rivera,* 553 F.2d 710 (1st Cir. 1977). *See also Woodham* v. *American Cystoscope Co. of Pelham, N.Y.,* 335 F.2d 551 (5th Cir. 1964) (courts may resort to disciplinary action against errant attorney); Annotation: *Dismissal of Action for Failure or Refusal of Plaintiff to Obey Court Order,* 4 A.L.R. 2d 348; Waterman, *An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Pur-*

In the present case, Judge Ferguson's first action as the new trial judge was to dismiss the case rather than to commence the trial for which all parties were then prepared. He did so even though no sanctions had been imposed during the prior fourteen-year history of the case.

The court of appeals similarly ignored the possibility of imposing a lesser sanction than outright dismissal, which, to paraphrase the words of the Fifth Circuit, did not "serve the best interest of justice." *Connolly* v. *Papachristid Shipping, Ltd., supra,* 504 F.2d at 920. For example, if the restriction of counsel's authority and subsequent change of counsel was deemed offensive, the court could have ordered Citizens to proceed to trial on a date certain or, in the alternative, suffer dismissal.[24]

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pose of Insuring Compliance with Pretrial Orders, 29 F.R.D. 420 (1961); Comment, *Sanctions at Pretrial Stages,* 72 Yale L.J. 819 (1963); Rosenberg, *Sanctions to Effectuate Pretrial Discovery,* 58 Colum. L. Rev. 480 (1958).

[24] There are two possible bases for dismissal pursuant to Rule 41(b): the court's need to avoid unnecessary congestion of its docket and the need to protect defendants from harrassment. Neither basis fits this case; either would have required the court to consider facts in the record which it failed to consider.

If claimed prejudice to the defendants was the basis of the district court's dismissal, as the court's opinion seems to indicate, then surely the defendants' contribution to that delay must be considered. If the basis for the dismissal was the district court's concern for congestion of its docket, then fairness would dictate that the court consider its own contribution to the delay as well.

Moreover, on this record, dismissal cannot be regarded as a tool to promote judicial efficiency, since this case had consumed no judicial time for twenty-seven months prior to the dismissal. It makes little sense to dismiss when a case is ready for trial, thus wasting sixteen years of preparation.

(3) This writ should be granted to ensure the fair and consistent application of Rule 41(b).

Whether to dismiss a case for lack of prosecution is a question entrusted in the first instance to the discretion of the district court. But, dismissal is a drastic remedy which "deprive[s] a litigant of his day in court," *Flaksa* v. *Little River Marine Construction Co., supra,* 389 F.2d at 888. And, this Court has recognized that the Federal Rules of Civil Procedure must be construed in light of the "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A.* v. *Rogers,* 357 U.S. 197, 209 (1958).

In the seventeen years since this Court's decision in *Link,* the various courts of appeals have reviewed over one hundred dismissals for lack of prosecution. The fact that they have used widely divergent standards in affirming or reversing trial court dismissals provides sufficient reason to grant this petition.[25]

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[25] This Court has repeatedly acknowledged its special responsibility to ensure the fair and consistent application of the Federal Rules of Civil Procedure. *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A.* v. *Rogers, supra,* 357 U.S. at 203; *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964); *Hickman* v. *Taylor,* 329 U.S. 495 (1947).

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit in this action.

Dated: September 4, 1979

LATHAM, WATKINS & HILLS
Carla A. Hills
William C. Kelly, Jr.
Robert B. Shanks

HELLER, EHRMAN, WHITE & MCAULIFFE
Weyman I. Lundquist

Attorneys for Petitioners
Citizens Utilities Company
and Citizens Utilities
Company of California

APPENDIX

APPENDIX A

CITIZENS UTILITIES COMPANY et al.,
Plaintiffs-Appellants,

v.

The AMERICAN TELEPHONE AND TELEGRAPH COMPANY et al.,
Defendants-Appellees.

No. 77-1941.

United States Court of Appeals,
Ninth Circuit.

April 30, 1979.

Appeal was taken from order of the United States District Court for the Southern District of California, Warren J. Ferguson, J., dismissing antitrust action. The Court of Appeals, Bright, Circuit Judge, held that with respect to antitrust action which had been pending for 16 years and had not yet been tried, district court's findings of prejudice to defendant and plaintiff's lack of diligence were supported by the record, with the result that there was no abuse of discretion in dismissal for want of prosecution.

Affirmed.

Weyman I. Lundquist, Esq., San Francisco, Cal., for plaintiffs-appellants.

Robert M. Westberg, San Francisco, Cal., for defendants-appellees.

Appeal from the United States District Court for the Southern District of California.

Before CARTER, Senior Circuit Judge, BRIGHT* and CHOY, Circuit Judges.

BRIGHT, Circuit Judge.

Appellants, Citizens Utilities Company and its California subsidiary (collectively, Citizens), filed this antitrust action against the appellees, American Telephone & Telegraph Company (AT&T), the Pacific Telephone & Telegraph Company (Pacific) and Bell Telephone Company of Nevada (collectively, Bell), in October 1960. Sixteen years later, this lawsuit had not yet been tried. On January 3, 1977, the district court[1] dismissed Citizens' action on two alternative grounds: (1) want of prosecution by Citizens, under Fed. R. Civ. P. 41(b); and (2) lack of jurisdiction, because the Federal Communications Commission (FCC) possesses either primary or exclusive jurisdiction over the subject matter of the action. Citizens appeals. We affirm the judgment of dismissal.

I. ***Factual Background.***

This action has its genesis in the period 1950-1957, when several disputes arose between Citizens and Bell concerning the division of revenues from "interchanged calls" between their systems, that is, telephone calls passing over interconnecting lines of

* Honorable Myron H. Bright, United States Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

[1] The Honorable Warren J. Ferguson, United States District Judge for the Northern District of California.

Citizens and one of the Bell companies.[2] Citizens, contending that its return on the use of its facilities for interchanged calls was unreasonably low, sought, among other things, change to a new method of dividing revenues, based upon a study of Citizens' expenses and investment relating to calls interchanged with Bell. In 1957, appellee Pacific rejected a cost study plan proposed by Citizens. Citizens agreed to a plan proposed by Pacific, but it inserted a clause in the agreement reserving its claims that prior divisions of revenue were unfair.

In October 1960, Citizens brought this action under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, 15, 26 (1976), alleging that the appellees combined and conspired to fix prices and to discriminate against Citizens by presenting a united front at negotiations with Citizens regarding the division of revenues from interchanged calls. Citizens has supplemented its complaint from time to time to allege continuing conspiracy and damages.

A detailed summary of the sixteen-year record of proceedings in this case from its filing until its dismissal in December 1976 would serve no useful purpose here. A few matters, however, deserve mention.

[2] In practice, Citizens and Bell divide revenues from calls interchanged between their systems by voluntary agreement.

The Federal Communications Commission (FCC) apparently possesses power, under the Federal Communications Act, 47 U.S.C. §§ 151 *et seq.* (1976), to regulate the division of revenues from interchanged calls, at least where it finds a particular method of division to be "unjust or unreasonable." *See* 47 U.S.C. §§ 201(a) and (b), 205(a). However, according to Citizens, the FCC has rarely, if ever, exercised that power.

The parties conducted extensive discovery between 1961 and 1971. However, the record fails to show any substantial activity by either party during several periods, for example, from June 1961 to February 1963, and most of 1965 and 1969.[3]

Over this eleven-year period from 1961-1971, Citizens' efforts to speed up the discovery process consisted of four motions for a preliminary pretrial conference aimed at establishing a schedule for completion of discovery, filed in May 1966, November 1968, August 1970, and July 1971.[4] Bell resisted Citizens' 1966 motion, contending that it was far from completion of discovery, and that motion was denied. The 1968 motion was also denied, for reasons which do not appear in the record. Citizens withdrew its 1970 motion after the parties stipulated to arrange a later pretrial conference and to "work out a timetable

[3] Apparently as a result of Citizens' inaction in 1961-63, United States District Judge Albert C. Wollenberg issued an order on October 11, 1963, directing Citizens to show cause why its complaint should not be dismissed for lack of prosecution. Citizens' response indicated that discovery in the case had begun following a letter sent by Citizens to Bell on February 18, 1963, requesting production of documents.

According to the affidavit of James Michael, an attorney for Bell, the parties suspended discovery in this case during 1965 while the lead counsel for both Bell and Citizens were engaged in the lengthy trial of another antitrust action.

The October 6, 1969 affidavit of Maxwell Blecher, attorney for Citizens, explained the 1969 period of inactivity as due in part to difficulty in scheduling the deposition of Citizens' president, Richard Rosenthal. Citizens had unsuccessfully sought to quash Bell's notice of deposition of Mr. Rosenthal.

[4] Citizens apparently abandoned its first motion for a pretrial conference, filed in March 1974.

for the completion of discovery * * * ." Bell effectively joined in Citizens' 1971 motion for a pretrial conference, though it also stated its intention to move for summary judgment on the ground that the federal courts lacked jurisdiction of the action.

On August 27, 1971, in accordance with the parties' stipulation, United States Senior District Judge George B. Harris entered a pretrial order establishing a briefing and hearing schedule for Bell's motion for summary judgment. Proceedings concerning two successive motions by Bell for summary judgment occupied the parties until April 1973. Judge Harris denied both of those motions.

The parties eventually stipulated to set the action for trial on March 18, 1974. However, in early March, Judge Harris advised the parties that because of a calendar problem he could not preside over the trial on March 18. Judge Harris suggested that the parties consent to a trial before a magistrate or that a new judge be assigned. Bell insisted upon trial before a judge, and the district court ordered the trial "off calendar."

Meanwhile, on February 20, 1974, Citizens' president, Richard Rosenthal, wrote to Citizens' lead attorney, Joseph F. Alioto, suspending his authority to act on behalf of Citizens. Citizens states in its brief that its dispute with Alioto resulted from his time-consuming political activities, "depriving Citizens of the [legal] services for which it had contracted."[5] Ali-

[5] Mr. Alioto was then a candidate for governor of California.

In a letter to Judge Harris, dated March 12, 1974, Lawrence Alioto, Joseph Alioto's brother and law partner, stated:

> The revocation of authority occurred at a time when this case was scheduled for trial on March 18. The case is complete-

oto filed a motion to withdraw as Citizens' counsel on April 5, 1974.

The record shows no further activity in the case until more than two years later, on June 4, 1976, when Citizens' present counsel filed their appearance. Citizens states that it spent that two-year interval searching for new counsel. During that period, no particular district judge had responsibility for the case. However, within two weeks of a request by Citizens' new counsel for a status conference, the case was assigned to United States District Judge Warren J. Ferguson.

At a status conference on September 20, 1976, Bell moved to dismiss the action under Fed.R.Civ.P. 41(b) for Citizens' failure to prosecute.[6] Following a hearing on December 17, 1976, Judge Ferguson granted Bell's motion to dismiss, stating that from his reading of

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ly ready for trial, and nothing remains but to try it. We are anxious to do so, whether to a master or to Your Honor.

While Mr. Rosenthal has withdrawn our authority to act, he has not discharged us or sought substitute counsel. I have advised Mr. Rosenthal that he must either authorize us to proceed, or else obtain substitute counsel. We much prefer the former course.* *

I am hopeful that this letter will cause Mr. Rosenthal to break the absolute stalemate in which he has placed this case. If we do not hear from him within a reasonable time, however, an appropriate motion will be filed.

[6] Fed.R.Civ.P. 41(b) provides in pertinent part:

For failure of the plaintiff to prosecute * * *, a defendant may move for dismissal of an action or of any claim against him. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision * * * operates as an adjudication upon the merits.

the record "16 years is too long" for this case, and such excessive delay "is simply a matter of pure procrastination on behalf of the plaintiff * * *." Judge Ferguson also held in the alternative that jurisdiction in the case lay in the regulatory agencies and not in the court. In his unpublished order denying Citizens' motion for reconsideration, filed on April 1, 1977, Judge Ferguson further stated:

> 16 years have passed since this action was instituted; the events at issue stretch back 25 to 30 years. Numerous witnesses have died; memories have faded. Actual prejudice, not merely presumed prejudice, has resulted. Here we do not have a single 16 year spell of inaction, but rather spaces throughout the course of litigation where procrastination, for whatever reason, slowed proceedings. Plaintiffs have an obligation to press forward with litigation, even if defendants in part slow their progress. They failed to do that here.

Final judgment of dismissal was entered on January 14, 1977. Citizens brought this timely appeal from the judgment and the district court's refusal to reconsider, contending that the district court abused its discretion under Rule 41(b) and erred in concluding that it lacked jurisdiction.

II. *The Dismissal for Failure to Prosecute.*

A dismissal under Rule 41(b) for failure to prosecute will be reversed only for abuse of discretion. *E. g., Anderson* v. *Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976); *Alexander* v. *Pacific Maritime Association*, 434 F.2d 281, 283 (9th Cir. 1970).

A district court's decision on a motion to dismiss for want of prosecution requires weighing conflicting policies: on the one hand, the court's need to manage

its docket, the public interest in expeditious resolution of litigation, and the risk of prejudice to defendants from delay; on the other hand, the policy favoring disposition of cases on their merits. *See Pearson* v. *Dennison*, 353 F.2d 24, 28-29 (9th Cir. 1965). Although prejudice to defendants may be presumed from "unreasonable" delay, *e. g., Alexander, supra*, 434 F.2d at 283, whether *actual* prejudice exists may be an important factor in deciding whether a given delay is "unreasonable." *Pearson* v. *Dennison, supra*, 353 F.2d at 29.

In this case, the district court found that actual prejudice resulted to Bell from delays caused, at least in part, by Citizens' inaction.[7] The court focused not only upon the period from March 1974 to June 1976, when Citizens allegedly was searching for new counsel, but also upon earlier periods of inactivity. The court recognized that foot-dragging by Bell may have contributed to the numerous delays, but it plainly indicated that Citizens failed to meet its "obligation to press forward with [the] litigation."

We have carefully reviewed the record. The district court's findings of prejudice to Bell and to Citizens'

[7] Bell presented evidence at the hearing on its motion to dismiss that many important defense (and also prosecution) witness are either deceased, incapacitated with illness or age, or retired and lying outside subpoena range.

Citizens contends that Bell's claim of prejudice is illusory because most of the key evidence in the case would be documentary, and testimony of nearly all of the "unavailable" witnesses is preserved in depositions.

In rebuttal, Bell notes that most of the documents designated by Citizens as probable evidence were sent or received by persons who may be unavailable to testify and that a deposition is a poor substitute for live testimony.

lack of diligence are supported by the record. Although the issue is a close one and might have been decided differently, we cannot say that the decision to order a dismissal of this action falls outside the discretion conferred upon a federal district judge under Fed.R.Civ.P. 41(b).

Accordingly, we affirm the judgment of dismissal.[8]

JAMES M. CARTER, Senior Circuit Judge, dissenting:

I respectfully dissent. I think the majority is wrong in affirming the trial court's dismissal of this action for failure to prosecute.

The majority adequately discusses the early years of the case. The defendants, like all defendants in antitrust cases, were not anxious to go to trial.

We pass up those early years when both sides were probably equally at fault as to delay, and come to the period beginning in 1971. There is no dispute that defendants deliberately delayed the action at various times. Defendants brought various motions for summary judgments, two during the 1971-73 period. Defendants then sought the remedy of an extraordinary writ to his circuit to review the trial court's denial of the motion for summary judgment. The request for the writ was denied and defendants sought certiorari. It was denied in December of 1973, nine months before the trial was to begin on March 18, 1974. Previously, the plaintiffs had filed five motions for a pretrial conference. Defendants resisted efforts

[8] In view of our affirmance of the Rule 41(b) dismissal, we do not reach the issue of whether the district court properly invoked the doctrine of primary jurisdiction.

to put the case on a schedule. Plaintiffs' fifth motion for a pretrial conference was made in 1971. Plaintiffs sought (1) a cutoff date for discovery; (2) a date for a final pretrial conference, and (3) a date for trial. Defendants requested instead an establishment of a filing and briefing schedule and a date for their proposed motion for summary judgment.

In argument before us on the appeal, it developed that plaintiffs had moved for the designation of a single judge to handle *all further proceedings and the trial of the case.* The defendants admitted that they had *opposed* the motion.

This action by the defendants is singularly demonstrative of their purpose to delay. For years the United States District Court at San Francisco had used the master calendar system and had refused to assign cases to a single judge for all purposes, including trial. It resulted in causing several judges, seriatim, to look into a particular case and make a decision. This resulted in a great loss of time. The writer, sitting pro tem. on the circuit in 1956, wrote *Yanish* v. *Barber,* 232 F.2d 939, showing that four different district judges had worked on the case and made decisions and orders. See pp. 942-943, listing Judges Lemon, Murphy, Harris, and Hamlin.[1]

We come now to the proceedings in the present case in the years 1974 to 1976. In late February or early

[1] The writer, as a member of the Pretrial Committee of the Judicial Conference of the United States, had participated in efforts to get the Northern District of California to adopt a "single judge" rule. The *Yanish* case was an opportunity to demonstrate the problem. The Northern District of California presently, and for some time, has assigned major cases to a single judge for all proceedings.

March of 1974 the case was ready for trial. Judge Harris advised the parties he would not try the case, then set for March 1974. He presented two alternatives: (1) assign the case to a magistrate for trial (which would have required the consent of both parties), or (2) assign the case to another judge. The trial date was vacated by Judge Harris.

After the vacation of the trial date difficulties intensified between plaintiffs and their counsel, Joseph Alioto.[2] He filed a motion to withdraw as attorney, meanwhile claiming a lien for attorney's fee on plaintiffs' records.

In response to these developments, Judge Harris wrote to Chief Judge Chambers asking to be relieved and that another judge be designated. Judge Chambers suggested the fee dispute be severed and designated Judge Battin to handle it. He stated "it would take a little longer to find a trial judge." Judge Battin's designation expired July 31, 1974, and no judge was assigned to the trial of the case.

The case was thus in limbo. It was *not* on *any* judge's pretrial or trial or dismissal list.

Meanwhile, plaintiffs were diligently seeking a replacement for Alioto. In January 1976, present counsel was obtained. In June, Judge Harris again wrote Judge Chambers requesting the assignment of another judge to try the case. On June 29, 1976, Judge Chambers assigned Judge Ferguson to the case.

[2] The defendants deliberately misled Judge Ferguson (who, in 1976, was assigned to the case) in their briefs and oral argument on the motion to dismiss. They contended that the trial was postponed because of a letter from plaintiffs' counsel, Joseph Alioto. Defendants, on the motion for reconsideration, tacitly admitted their representations were untrue.

The defendants' response was to file the motion to dismiss for lack of prosecution. While the motion was pending both sides filed trial briefs of law and fact, looking in part toward the trial of the case. But in their brief, defendants, for the third time, resurrected their claim (twice previously rejected) that the Federal Communications Commission or the California Public Utilities Commission had jurisdiction.

The majority calls the decision on failure to prosecute "a close one." I agree. On the record, major contributions were made by defendants to the delay. The parties were ready for trial in 1974. Judge Harris refused to try the case, and there was a gap of two years while the case was not assigned to any judge.

On this record I think it a miscarriage of justice to dismiss the action. In the early years both parties were responsible for delays. But it was a big case and such cases move slowly. Defendants had never claimed delay by plaintiffs. No motion to dismiss was made on such ground.

But in the period after 1971 defendants were clearly guilty of delaying tactics, as shown above. Still, no motion to dismiss was made until a new judge was assigned. As plaintiffs have argued, the defendants had run out their maneuvers of motions for summary judgment and for lack of jurisdiction, and now it was either *trial* or a motion to dismiss for delay. To reward defendants for their delaying conduct seems to me unthinkable. It was a breach of discretion to dismiss.[3]

I would reverse and let the case be tried.

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[3] The district court found prejudice to the defendants. The majority fairly presents both sides of the issue in the last two paragraphs

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil No. 39483-WJF

CITIZENS UTILITIES COMPANY, et al.,
Plaintiffs,

v.

THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,
Defendants.

MEMORANDUM AND ORDER

Plaintiffs, pursuant to Federal Rule of Civil Procedure 59 have moved for reconsideration of the court's ruling dismissing this case. The court has once again reviewed the arguments of both parties, but upon careful consideration concludes that its original order and judgment must stand.

The court has discretion under Federal Rule of Civil Procedure 41(b) to dismiss for want of prosecution where the totality of the circumstances warrant such action. The failure to go to trial in March 1974, whether resulting from plaintiffs' decision to substitute counsel or from the court's calendar considerations is only one of those circumstances. 16 years have passed

since this action was instituted; the events at issue stretch back 25 or 30 years. Numerous witnesses have died; memories have faded. Actual prejudice, not merely presumed prejudice, has resulted. Here we do not have a single 16 year spell of inaction, but rather spaces throughout the course of the litigation where procrastination, for whatever reason, slowed proceedings. Plaintiffs have an obligation to press forward with litigation, even if defendants in part slow their progress. They failed to do that here.

Dismissal is also warranted on jurisdictional grounds. The court did not rule, as plaintiffs now suggest, that the telephone company defendants are protected from antitrust suits because of a blanket immunity resulting from FCC regulation. Instead the court concluded that where the claim asserted by plaintiffs involves simply the division of revenues within the telephone industry, the proper forum is not in a district court, but in the FCC. *Cf., e.g., Montana-Dakota Co.* v. *Public Serv. Co.*, 341 U.S. 246 (1951). The doctrine of primary jurisdiction as applied in *Foremost International Tours* v. *Qantas Airways, Ltd.*, 525 F.2d 281 (9th Cir. 1975), *cert. denied*, ____ U.S. ____ , requires the same result. Whether these considerations be purely jurisdictional or whether they constitute a determination that the complaint fails to state a claim upon which relief may be granted, plaintiffs have now had an opportunity to present their argument on the matter and the court may dismiss the action on its own motion. *See Dodd* v. *Spokane County*, 393 F.2d 330, 334 (9th Cir. 1968); 5 Wright & Miller, *Federal Practice and Procedure* § 1357.

IT IS ORDERED that plaintiffs' motion for reconsideration be and the same is hereby denied.

IT IS FURTHER ORDERED that the clerk serve a copy of this order by mail upon the parties appearing in this action.

Dated this 29th day of March, 1977.

/s/ Warren J. Ferguson
WARREN J. FERGUSON
United States District
Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HONORABLE WARREN J. FERGUSON,
JUDGE PRESIDING

Civil No. 39483-WJF

CITIZENS UTILITIES COMPANY and
CITIZENS UTILITIES COMPANY OF CALIFORNIA,
corporations,

Plaintiffs,

v.

THE AMERICAN TELEPHONE AND TELEGRAPH
COMPANY, THE PACIFIC TELEPHONE AND
TELEGRAPH COMPANY, and BELL TELEPHONE
COMPANY OF NEVADA, corporations,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Friday, December 17, 1976
San Francisco, California
[EXCERPT]

* * *

THE COURT: That is fine, Mr. Westberg. Just be seated, gentlemen.

All decisions which courts are required to make are not made in an intellectual sound chamber where you are divorced from reality. This summer when Chief Judge Chambers asked me to take over two cases, one in San Francisco and one in Las Vegas, I did so primarily for selfish reasons. I enjoy Las Vegas and I enjoy San Francisco. Both have its attractions which not even Los Angeles at all times can surpass. And by taking over the cases this provided quasi-vacations, a chance to experience all that San Francisco has.

And when Mr. Westberg was in chambers several months ago indicating to me that he was going to file a Motion to Dismiss on the basis of a lack of prosecution, my instincts were to slough it off and deny it. The case was ready for trial and I would enjoy a case by two eminently qualified lawyers.

But now I am convinced, Mr. Lundquist, that I have no alternative but to grant the motion.

No matter how you slice it, in segments of six months or one year or two-and-a-half years and you put it in little pigeon holes all over the place and you look at the docket entries, 16 years is too long.

And as best as I can establish from reading the record, I know your sincerity and I know your intensity but that is now in the future and I have to look at what happened in the past and it is simply a matter of pure procrastination on behalf of the plaintiff, for whatever reasons I know not.

Now, while it is not the purpose of this Court nor can it judge the merits of the litigation, you say that AT&T is bad, they say that they are good. You know, that is a disputed issue of fact in which I cannot, even

for the purpose of granting this motion, consider. The merits are not before me and will not be before me. But the jurisdiction of the court is before me and that is the first thing you learn when you take the Federal bench coming from the State bench, that jurisdiction is always a matter to be considered.

And on the issue of jurisdiction, I have to agree with Judge Barnes in the Qantas case. Judge Barnes' expertise is certainly well known by counsel and when he says that in this kind of a case where the Complaint of action has an anti-competitive effect primarily confined to the regulated industry in question and where the anti-competitive effects arise from regulation, conduct, records, agreements and so forth which are wholly of an intra-industry nature, the only appropriate course of action for a District Court to take when faced with a conflict between regulatory agency jurisdiction over these matters and the court's own antitrust jurisdiction is to, one, dismiss the antitrust action and refrain from itself acting until a review of the agency's determination of the matter comes before it or, two, in the event that the agency does not have sufficient means to provide the full panoply of antitrust remedies sought, to stay proceedings in the District Court until after the regulatory agency has acted.

And, you know, Judge Barnes was explicit and in my opinion based upon the briefs and the contentions filed by the plaintiff, whether or not you call it exclusive jurisdiction or primary jurisdiction in the regulatory agencies, this court does not have jurisdiction at this time to proceed.

Therefore, based upon procrastination for 16 years and based upon my determination that jurisdiction

lies in the regulatory agencies and not in this court, the motion must be granted and it will be granted.

This gives you a perfect record, Mr. Lundquist, to proceed upstairs and I hope you pursue it. Thank you.

MR. LUNDQUIST: Thank you, your Honor.

MR. WESTBERG: Thank you, your Honor.

THE COURT: Court will be in recess.

(Whereupon, at 11:03 A.M. an adjournment was taken in this matter.)

Supreme Court, U. S.
FILED
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-365

CITIZENS UTILITIES COMPANY and CITIZENS UTILITIES COMPANY OF CALIFORNIA,
Petitioners,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY and BELL TELEPHONE COMPANY OF NEVADA,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The petition for a writ of certiorari presents a routine question concerning an application by the district court of Rule 41(b) of the Rules of Civil Procedure to dismiss an antitrust action for lack of prosecution. The case was 16 years old when the motion to dismiss was filed and had been totally dormant for 27 months. The district court's decision was made after full briefing and a hearing. Based upon its assessment of the facts involved, the district court found that the delay was "simply a matter of pure procrastination on behalf of the [petitioners]" (Pet.Appx., p. C-2). Upon a request for reconsideration, viewing "the totality of the circumstances", the district court found that (a) 16 years had passed since the action was instituted; (b) the events at issue stretched back 25 or 30 years; (c) numerous witnesses had died; (d) witnesses' memories had

faded; (e) actual prejudice to respondents, not merely presumed prejudice, had resulted from the delay; and (f) petitioners had failed to press forward with the case (Pet. Appx., pp. B-1 to B-2).

The court of appeals affirmed, pointing out that it had "carefully reviewed the record" and held that the district court's findings of procrastination and actual prejudice to respondents were "supported by the record" (Pet.Appx., pp. A-8 to A-9).

Petitioners' strained assertion that there is a conflict between the circuits arising from the court of appeals' affirmance in this case is erroneous and is actually based upon a misquotation, in the petition, of the Fifth Circuit decision on which they principally rely (see infra, p. 12). There is no conflict between the circuits and no reason exists for this Court to review the judgment. The court of appeals simply held, based upon its own analysis of the factual circumstances, that the order of dismissal was within the range of discretion conferred upon the trial courts by Rule 41(b) (Pet.Appx., pp. A-8 to A-9). The decision of the court of appeals is correct.

QUESTIONS PRESENTED

Petitioners' statement of the questions presented is based on their culled, one-sided and wholly inaccurate statement of the record, which disregards the trial court's findings as well as the facts which the court of appeals held supported those findings (Pet.Appx., pp. A-4 to A-9).

The questions presented are:

1. Where the trial court found "pure procrastination on behalf of the plaintiff" and found that actual prejudice, not merely presumed prejudice, resulted from the delay, did the Ninth Circuit erroneously fail to find an abuse of discretion in the trial court's dismissal of a 16-year-old case?

2. Is there a conflict in the circuits with regard to the standard of review of dismissals ordered under Rule 41(b), Federal Rules of Civil Procedure?

STATEMENT OF THE CASE

The action concerns the terms and conditions upon which the telephone lines of petitioners (hereinafter sometimes "Citizens") were connected with those of respondents (hereinafter "defendants") and the reasonableness of the manner in which toll revenues from telephone calls passing between the companies (interchanged calls) were divided. The disagreements which led to the case arose between 1950 and 1957. The basis at that time for dividing toll revenues between Bell System and independent (non-Bell) telephone companies was that the independent company should receive its own costs or expenses devoted to carrying the interchanged telephone calls, plus a reasonable rate of return on its property allocated to the interchanged calls. In 1957 a division of revenue agreement had been negotiated between petitioners and defendant The Pacific Telephone and Telegraph Company ("Pacific") which changed the method of ascertaining Citizens' costs. Differences then arose as to the effective date of the new agreement and the reasonable rate of return to Citizens. Citizens ultimately accepted the agreement in the form proposed by Pacific, subject to a clause reserving Citizens' claims that

prior divisions of revenue had been unfair (Pet.Appx., p. A-3). This reservation of rights occurred in June 1957; in October 1960, petitioners filed this suit.

Petitioners' arguments (Petition, pp. 3-4) that defendants used a "strategy of delay" to frustrate Citizens' right to trial and that Citizens did not delay the proceedings are the same arguments they urged below and which the lower courts rejected. The record supports the lower courts' conclusions.

Not only had petitioners delayed in filing the action, they were never diligent in expediting the case and the proceedings included long periods of total inactivity, e.g., 21 months with no action by petitioners appearing on the docket; 16 months with no apparent action; 13 months with no action but for a motion for pretrial conference, subsequently withdrawn. Petitioners failed to invoke the regular procedures of the local rules under which they could have compelled trial at any time they were ready. As the court of appeals recognized, petitioners' own inactivity resulted in at least one order of the trial court to show cause why the case should not be dismissed (Pet.Appx., p. A-4 n. 3).

The 16-year record of proceedings in the case was before the trial court and the court of appeals and no purpose would be served here by detailing that record. We do point out, however, that petitioners mischaracterize the record in numerous respects. For example, contrary to the petitioners' assertion that defendants opposed a motion for a pretrial conference in 1964 (Petition, p. 4), the record shows, as noted by the court of appeals, that the motion was apparently abandoned (Pet.Appx., p. A-4 n. 4).

Again, the petitioners erroneously assert that defendants opposed motions for pretrial conferences in 1970 and 1971 (Petition, p. 14). The record shows that petitioners withdrew their 1970 motion after the parties agreed to arrange a pretrial conference (Pet.Appx., p. A-4). And the court of appeals correctly points out that defendants "effectively joined in Citizens' 1971 motion for a pretrial conference, though [they] also stated [their] intention to move for summary judgment on the ground that the federal courts lacked jurisdiction of the action" (Pet.Appx., p. A-5).

As the court of appeals observed, defendants did oppose one motion for a pretrial in 1966 (Pet.Appx., p. A-4)—10½ years before the case was dismissed—but petitioners were not then ready for trial. They subsequently amended their complaint in 1967 (Record at 108), stipulated in 1970 to an indefinite continuance of the pretrial conference to which defendants had previously agreed (docket item 114), and stipulated in 1971 to a schedule for briefing and hearing defendants' motion for summary judgment (Record at 174). And, when the case was set for trial in March 1974, "on the eve of the trial" petitioners decided that the law firm then representing them "should not represent Citizens any longer" (Aff. of Richard L. Rosenthal (petitioners' president), filed December 1, 1976). Thereafter, the case lay dormant and apparently abandoned for 27 months, a matter solely the responsibility of petitioners themselves.

In September 1971, pursuant to a stipulated pretrial order, defendants filed a motion for summary judgment, which was denied, and the case was then for the first time set for trial on March 5, 1973. Immediately following this Court's decisions in *Ricci* v. *Chicago Mercantile Exchange*

(1973) 409 U.S. 289 and *Hughes Tool Co.* v. *Trans World Airlines* (1973) 409 U.S. 363, decided on January 9 and 10, defendants advised the trial court that they would renew the summary judgment motion on the basis of those decisions (Record at 269, 277). The renewed motion was then filed February 1 and occupied the parties until December 1973 (docket item 159).

The action was then set for trial on March 18, 1974 (docket item 160). The trial, however, was not to occur. On February 20, 1974, petitioners' president Richard L. Rosenthal wrote to petitioners' counsel revoking his authority to act on petitioners' behalf (Pet.Appx., p. A-5 n. 5; Record at 350-351). Then in early March, Judge Harris advised the parties that because of a calendar conflict he could not preside over the trial on March 18; he suggested that the parties consent to a trial before a magistrate or that a new judge be assigned (Pet.Appx., p. A-5). Defendants on March 7 requested that the case be assigned to another judge (Record at 341). Petitioners' counsel informed the court on March 12 that he could not respond to the problem because the clients had "withdrawn [Mr. Alioto's] authority to act without Mr. Rosenthal's prior approval" (Record at 339). Petitioners' counsel also advised:

> "The revocation of authority occurred at a time when this case was scheduled for trial on March 18. The case is completely ready for trial, and nothing remains but to try it. We are anxious to do so, whether to a master or to Your Honor.
>
> "While Mr. Rosenthal has withdrawn our authority to act, he has not discharged us or sought substitute counsel. I have advised Mr. Rosenthal that he must

> either authorize us to proceed, or else obtain substitute counsel. • • •
>
> "I am hopeful that this letter will cause Mr. Rosenthal to break the absolute stalemate in which he has placed this case. If we do not hear from him within a reasonable time, however, an appropriate motion will be filed" (Record at 339-340, quoted in Pet.Appx., p. A-5 n. 5).

The trial was ordered "off calendar" (docket entry, Mar. 18, 1974). On April 5, 1974, petitioners' counsel Joseph L. Alioto moved to withdraw as attorney of record and for an order fixing compensation (Pet.Appx., pp. A-5 to A-6).

The docket then shows no further activity in the case for more than two years, until June 4, 1976, when petitioners' present counsel filed their appearance (*ibid.*). There is then no further action shown until a status conference called by the trial court in September 1976 (Record at 398). This was followed by defendants' motion to dismiss (Record at 400).

The only factual showing petitioners made in opposition to the motion to dismiss was an affidavit of petitioners' president Richard L. Rosenthal, which did not comment on any of the proceedings prior to March 1974 and which explained the failure to go to trial at that time as follows:

> "This case was set for trial to commence in the spring of 1974. Some brief time before that trial date, it became clear that Joseph L. Alioto, Citizens' attorney, was not going to carry out undertakings he had made with respect to trial of the case. Given past differences and the critical nature of the differences on the eve of the trial, it was decided that the Alioto firm should not

represent Citizens any longer. Differences then arose concerning fees and the release of records held by the Alioto office. The case was taken off trial calendar and a hearing held before a specially assigned judge in connection with the records and fee matter" (Aff. of Richard L. Rosenthal, filed December 1, 1976).

The affidavit went on to refer to a two-year search for replacement counsel, which Mr. Rosenthal described as "difficult and time-consuming" (*ibid.*).

Following a hearing on December 17, 1976, the motion to dismiss was granted (Record at 567). In granting the motion the court pointed out to petitioners' counsel:

> "[A]s best as I can establish from reading the record, I know your sincerity and I know your intensity but that is now in the future and I have to look at what happened in the past and *it is simply a matter of pure procrastination on behalf of the plaintiff, for whatever reasons I know not*" (Pet.Appx., p. C-2, emphasis added).

On motion for reconsideration, the trial court pointed out that it had "once again reviewed the arguments of both parties, but upon careful consideration [concluded] that its original order and judgment must stand" (Pet.Appx., p. B-1).

Based upon this record, the court of appeals held that the trial court's ruling was within the range of his permissible discretion under Rule 41(b).

REASONS WHY THE PETITION SHOULD BE DENIED

A. Petitioners' arguments for review seek a reexamination of factual determinations made below on a question of no great importance.

Although petitioners claim that the relevant facts are not in dispute (Petition, p. 4), their entire argument, including their spurious contention that the decision below is in conflict with rulings from other circuits, is based upon factual assertions which were rejected by the lower courts.

The question before the court of appeals was not whether that court would as an original matter have dismissed the action; it was whether the district court abused its discretion in so doing. Cf. *National Hockey League* v. *Met. Hockey Club* (1976) 427 U.S. 639, 642-643. The drawn-out history of the case, petitioners' inattention in the early years, capped by 27 months of total inactivity, together with the actual prejudice found to have resulted to defendants, fully justified the appellate court's affirmance of the district court. Petitioners cite no case of reversal of a district court's exercise of discretion in circumstances such as these.

Petitioners' argument (Petition, pp. 10-11) that the decision in this case is contrary to *Link* v. *Wabash Railroad Company* (1962) 370 U.S. 626 is disingenuous, to say the least. For example, the petitioners' assertion that "[t]wo of the three appellate judges below decided that delay alone, for 'whatever reason', was sufficient ground for the trial court's dismissal" (Petition, p. 11) is simply untrue. What the trial court found, and what the court of appeals held was sufficient, was *"pure procrastination on behalf of the plaintiff*, for whatever reasons I know not" (Pet.Appx., p. C-2, emphasis added). Petitioners' related contention,

that "the courts below did not find or suggest that Citizens deliberately caused delay" (Petition, p. 11), is squarely refuted by the finding of procrastination.

Petitioners' attempt to show inconsistency between this case and *Link* v. *Wabash* is based entirely upon their mischaracterizations of the record that (a) petitioners made "numerous determined efforts" to bring this case to trial; (b) that defendants opposed "all of Citizens' efforts"; and (c) that the district court was responsible for the final 27 months of delay (Petition, p. 11). The opinion of the court of appeals shows that each of these contentions was rejected (Pet.Appx., pp. A-4 to A-6).

The record in this case should be compared with that of *Link* v. *Wabash,* in which the trial court's dismissal of an action was sustained. The *Link* case had been filed in 1954, and the "drawn-out history of the litigation" (370 U.S. 633) was only 6 years old when the case was dismissed. For nearly 3 of those years, until 1957, a defense motion for judgment on the pleadings, which had been erroneously granted and reversed on appeal, had prevented any possibility of trial. Then, a 1959 trial date had been vacated on the motion of *defendant,* to which plaintiff had agreed (370 U.S. 628 n. 2). In sustaining the dismissal in the *Link* case as "within the bounds of permissible discretion" (370 U.S. 633), the Court observed that "it could reasonably be inferred" that petitioner had been deliberately proceeding in dilatory fashion (*ibid.*). In the instant case, the final 27 months of total inaction, as well as the 16-year drawn-out history, equally sustain the inference that petitioners were deliberately dilatory. Indeed, the trial court expressly found both procrastination and prejudice.

Petitioners erroneously assert that the trial court had responsibility for the final 27 months of delay (Petition, pp. 11, 19-20). What the record actually establishes is that petitioners always had the power to bring the case to trial, had they so desired and had they acted. For example, when a judge was requested to hear Mr. Alioto's motion for leave to withdraw and for an order fixing attorneys' fees, filed in April 1974 (docket item 167), Judge Battin was promptly designated and a hearing was had in May of 1974 (docket entry, May 23, 1974). And the court of appeals specifically noted that when, after two years of further delay, petitioners retained new counsel to revive the action, the designation of Judge Ferguson followed within two weeks (Pet.Appx., p. A-6). Petitioners have only themselves to blame for their own years of inaction.[1]

B. There is no conflict between the circuits raised by the court of appeals' affirming the dismissal of this action.

In a futile effort to manufacture a conflict where none exists, petitioners present a purported statistical analysis of appeals since the *Link* decision involving Rule 41(b) (Petition, pp. 11-12). That "analysis" is barren of any facts and does not suggest that the courts of appeals are applying different standards in such cases. In fact, they are not.

[1]In their petition, petitioners characterize their unexplained decision, on the eve of trial, to dismiss Mr. Alioto as a "side issue" and "irrelevant to the decisions below" (Petition, p. 8 n. 9) because Judge Harris had a calendar problem in March 1974. Nothing in the record suggests, however, how Judge Harris' calendar problem could be material to petitioners' actions in the case, or could have affected their failure to prosecute. Indeed, the record (supra, pp. 7-8) shows that petitioners' termination of Mr. Alioto prevented a trial before any judge until 1976.

Petitioners' principal argument, that the Ninth Circuit's disposition of the case at bench is inconsistent with certain cases from the Fifth Circuit, rests upon an inexplicable misquotation of the Fifth Circuit's decision in *Durham* v. *Florida East Coast Railway Company* (5 Cir. 1967) 385 F.2d 366. Petitioners quote *Durham* as requiring

> "'a clear record of delay *and* contumacious conduct by the plaintiff'" (Petition, pp. 13, 14, emphasis added),

whereas the opinion of the Fifth Circuit refers to

> "a clear record of delay *or* contumacious conduct by the plaintiff" (385 F.2d 368, emphasis added).

Inasmuch as the Ninth Circuit decision here is based upon a clear record of delay, and a specific finding of procrastination, there is no basis for asserting an inconsistency between it and any Fifth Circuit decision.

Moreover, the three Fifth Circuit cases cited in the petition (p. 13) are on their facts totally inapposite to the present case. None raises a question as to the legal standard applied by the Ninth Circuit. In *Durham*, the Fifth Circuit reversed a dismissal of a case which was less than a year old when dismissed, noting that there would have been no prejudice to defendant had a requested voluntary dismissal been granted (385 F.2d 368-369). In *Connolly* v. *Papachristid Shipping Ltd.* (5 Cir. 1974) 504 F.2d 917, in circumstances analogous to *Durham*, the appellate court reversed a dismissal, emphasizing the practical realities faced by a foreign seaman in the West Indies attempting to comply with an order requiring substitution of Alabama counsel within a few days, and observed that the record did not even indicate that plaintiff had received notice of the order in question (504 F.2d 920). Finally, *Flaksa* v.

Little River Marine Construction Co. (5 Cir. 1968) 389 F.2d 885 specifically states that a district court may dismiss upon a plaintiff's failure to prosecute "with reasonable diligence" (389 F.2d 887) and relies upon Ninth Circuit decisions for the proposition (389 F.2d 887 n. 2).[2]

Nor, contrary to petitioners' implication (Petition, p. 14), has either the Second Circuit or the Fourth Circuit suggested that dismissals under Rule 41(b) are limited to instances of "delay and contumacious conduct" by plaintiff or questioned the Ninth Circuit's standard for review.[3]

Petitioners' further effort, at page 14 of the petition note 12, to compare and contrast decisions under Rule

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[2]Petitioners' erroneous contention that the Fifth and Ninth Circuits are split on the standard for reviewing Rule 41(b) dismissals is further destroyed by the fact that the Ninth Circuit has both cited and distinguished *Flaska* (e.g., *Von Poppenheim* v. *Portland Boxing & Wrestling Com'n* (9 Cir. 1971) 442 F.2d 1047, 1049 and *Industrial Bldg. Materials, Inc.* v. *Interchemical Corp.* (9 Cir. 1970) 437 F.2d 1336, 1339, citing; and *Anderson* v. *Air West, Inc.* (9 Cir. 1976) 542 F.2d 522, 526 and *States Steamship Company* v. *Philippine Air Lines* (9 Cir. 1970) 426 F.2d 803, 805, distinguishing). Moreover, the Fifth Circuit, in a case coming after both *Durham* and *Flaska*, relies upon the Ninth Circuit decision in *Hicks* v. *Bekins Moving & Storage Co.* (9 Cir. 1940) 115 F.2d 406, one of the cases claimed in the petition (p. 18) as demonstrating that the Ninth Circuit rule is different from that of other circuits (*Delta Theatres, Inc.* v. *Paramount Pictures, Inc.* (5 Cir. 1968) 398 F.2d 323, 325).

[3]The Second Circuit case cited by petitioners, *Gill* v. *Stolow* (2 Cir. 1957) 240 F.2d 699 (Petition, p. 14), considers a default judgment under former Rule 37 for "willfully" failing to appear at deposition (240 F.2d 670) and suggests nothing as to the standard of review of a dismissal for failure to prosecute. *Reizakis* v. *Loy* (4 Cir. 1974) 490 F.2d 1132, cited as representative of the Fourth Circuit view, suggests no conflict with the Ninth Circuit but specifically cites Ninth Circuit cases (490 F.2d 1135) in holding that a motion for continuance should have been granted and that a monetary sanction was available in that case to rectify any possible harm occasioned by rescheduling the trial (*id.*, at 1136). *Reizakis* involved no "drawn-out history" as in *Link* v. *Wabash* or the instant case.

41(b) is misleading. When the truncated descriptions of those cases as set forth in the petition are filled in with the facts upon which each decision was made, it is apparent that those courts apply standards consistent with *Link* v. *Wabash* and with each other. For example, one of the decisions cited, *Glo Co.* v. *Murchison and Company* (3 Cir. 1967) 397 F.2d 928, because of the "unusual nature of the circumstances" in that case (397 F.2d 929), is of limited precedential value even in the Third Circuit (see, e.g., *Spering* v. *Texas Butadiene & Chemical Corporation* (3 Cir. 1970) 434 F.2d 677, 681).

Petitioners' argument (Petition, p. 18) that there is disagreement among the lower courts concerning the weight to be assigned to any delay that may have been caused by a defendant is also unsupported. Where the question of a defendant's conduct has been raised, the courts consider it as one factor among others (e.g., *Zavala Santiago* v. *Gonzales Rivera* (1 Cir. 1977) 553 F.2d 710, 712 and *Boudreau* v. *United States* (9 Cir. 1957) 250 F.2d 209, 211), as was done here; but there is no disagreement that the responsibility for moving a case forward lies with the plaintiff (*S & K Airport Drive-In, Inc.* v. *Paramount Film Dist. Corp.* (E.D.Pa. 1973) 58 F.R.D. 4, 7, affirmed (3 Cir. 1973) 491 F.2d 751).[4]

Finally, at page 15, the petition suggests that the "commentators" would find an abuse of discretion in the trial

[4]In the one case cited by petitioners as allegedly creating a conflict, *Foxboro Co.* v. *Fischer & Porter Co.* (E.D.Pa. 1961) 29 F.R.D. 522, stagnation had been caused by a defendant's active and explicit request that plaintiff tell his attorneys to stop their "maneuvering" so as not to upset settlement negotiations (29 F.R.D. 523).

court's considering petitioners' delays in the first 11 years of this case, because defendants had stipulated to a trial in 1974. As in *Link* v. *Wabash*, however, the district court properly "relied on *all* the circumstances that were brought to its attention, including the earlier delays" (370 U.S. 634, emphasis in original).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondents' brief in opposition to the petition for certiorari mischaracterizes Petitioners' arguments and the decisions of the courts below.

First, Respondents note that Judge Harris gave the parties the option of "a trial before a magistrate or the assignment of a new judge," but then Respondents state at page 6 of their brief that,

> "Petitioner's counsel informed the Court on March 12 that he could not respond to the problem."

Petitioners' counsel made no such statement. His only relevant comment, made *after* Respondents refused to proceed with a Magistrate's trial, was that Petitioners' case was ready for trial "whether to master or to Your Honor." Record at 339.

Respondents' claim that Petitioners' dispute with their original counsel delayed the trial of this case is the precise claim that provoked Judge Carter to state that Respondents' counsel "deliberately misled Judge Ferguson . . . ." Petition at A-11, n.2.

Respondents compound this inaccuracy with another on page 11 of their brief:

> "What the record actually establishes is that petitioners always had the power to bring the case to trial, had they so desired and had they acted. For example, when a judge was requested to hear Mr. Alioto's motion for leave to withdraw and for an order fixing attorneys' fees . . . , Judge Battin was promptly designated . . . ."

Yet the record clearly shows that Judge Battin was appointed only for the limited purpose of presiding over the fee dispute. Respondents' statement conveniently ignores Chief Judge Chambers' statement in appointing Judge Battin that,

> "It would take a little longer to find a trial judge [for the] long trial." Record at 568, Exhibit C.

The uncontested record thus shows that Respondents forced the case off calendar by refusing trial before a Magistrate *before* Petitioners' dispute with counsel was announced to the court.

In short, Petitioners' dispute with their original counsel was totally irrelevant to this delay, and it is misleading for Respondents repeatedly to claim otherwise.

Second, on pages 2 and 9 of their brief Respondents inexplicably contend that the district court "found" procrastination by Citizens, and on page 9 of their brief Respondents contend that the Court of Appeals "held" that "finding" to be "sufficient."

The district court made so such finding. Respondents utilize Judge Ferguson's off-hand comments at the hearing, which are irrelevant in view of the language of his subsequent order:

> "Here we do not have a single 16 year spell of inaction, but rather spaces throughout the course of the litigation where procrastination, for whatever reason, slowed proceedings. *Plaintiffs have an obligation to press forward with litigation, even if defendants in part slow their progress.* They failed to do that here. Petition at B-2 (emphasis added).

Both courts below failed to evaluate the respective roles of plaintiffs, defendants, and the court in delaying the prosecution of the case as required by this Court's decision in *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962).

Respondents further claim to have suffered prejudice as a result of the long delay. Respondents' Brief at 1-2. But Respondents may not rely on delay for which they were largely responsible (see Petition at pp. 18-19). Further, if there was any prejudice to Respondents, it occurred before Respondents stipulated to trial dates on March 5, 1973, and again on March 18,

1974. Having so stipulated, Respondents cannot properly rely on alleged prejudice that occurred prior to their stipulation (see Petition at pp. 14-15).

Finally, Respondents contend at page 12 of their brief that Citizens' principal argument rests upon an "inexplicable" misquotation from the Fifth Circuit's decision in *Durham* v. *Florida East Coast Ry.*, 385 F.2d 366 (5th Cir. 1967), in which Citizens' petition uses the word *"and"* instead of *"or"*. We regret the typographical error, but the conjunction is irrelevant to Citizens' arguments. Neither the district court nor the circuit court found either a "clear record of delay" by Citizens *or* any "consumacious conduct" (indeed, none was even alleged).

Accordingly, Citizens' petition for certiorari to the Court of Appeals for the Ninth Circuit should be granted.

Dated: October 11, 1979

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